It has long been a settled rule that impossibility of performance arising from a change in the law exonerates a promisor. Anson, *Contract* (Corbin's ed. 1919) 433; where, however, the courts have tried to determine the degree of hardship of performance necessary to discharge a lessee, there is conflict. Some courts hold that where premises are leased for saloon purposes only, the lessee is not absolved from liability under a subsequently enacted prohibition statute. *O'Byrne v. Henley* (1909) 161 Ala. 620, 50 So. 83; *Hecht v. Acme Coal Co.* (1911) 19 Wyo. 18, 113 Pac. 788. Others hold that even where the premises are leased for saloon and hotel purposes the lessee is absolved. *Kahn v. Wilhelm* (1915) 118 Ark. 239, 177 S. W. 403; *Kaiser v. Zeigler* (N. Y. Sup. Ct.) N. Y. L. J. May 2, 1921. The most logical rule, however, seems to be that the court should first inquire whether the use is permissive or restrictive. *Brunswick-Balke-Collender Co. v. Seattle Brewing etc. Co.* (1917) 98 Wash. 12, 167 Pac. 58. If permissive the lessee will not be discharged. *Security Bank v. Claussen* (1919, Calif. App.) 187 Pac. 140. But if restrictive, the court should then further determine whether the business is merely made less valuable, in which case the lessee must still perform, or whether it is totally destroyed, in which case the lessee should be discharged. *Conklin v. Silver* (1919, Iowa) 174 N. W. 573; *The Stratford Inc. v. Seattle Brewing Co.* (1916) 94 Wash. 125, 162 Pac. 31. The instant New Jersey case decides that a "café" means a restaurant and saloon, and hence the rule that the business has merely become less valuable is applied; while the New York case decides that the "saloon" business is totally destroyed by the National Prohibition Act and hence the rule of total impossibility is applied. It is to be noted, however, that it is not the lessee's duty under the lease (i. e. to pay rent) which has become impossible to perform, but the condition precedent, which the courts imply, that the premises were to be used for a certain purpose.

CRIMINAL LAW—PROCEDURE—DOUBLE JEOPARDY—NEW TRIAL AFTER CONVICTION OF DEFENDANT.—The defendant was indicted for receiving stolen goods. At the same time, but in a separate indictment, another prisoner was charged with stealing and receiving the same goods. The two men were tried jointly and convicted. The defendant appealed on the grounds of "mis-direction and mis-reception of evidence." After notice of appeal it was discovered that the indictments were several. *Held,* that the trial was a nullity and a *venire de novo* should be awarded. *Rex v. Crane* (1920, Cr. App.) 124 L. T. R. 256.

The instant case suggests the interesting and much controverted question as to the extent of the power of a court to order a new trial in a criminal case after conviction. Unquestionably the early English law was to the effect that a court had no such power. It was argued that the defendant would be placed in double jeopardy. See *King v. Mawbey* (1796, K. B.) 6 T. R. 620, 638; 1 Chitty, *Criminal Law* (1819) secs. 653, 654. But, as in the instant case, a distinction was made where the court had no jurisdiction and the trial was a nullity. *Rex v. Fowler* (1821, K. B.) 4 Barn. & Ald. 273. This rule was adopted also in this country in a few early decisions, holding that a new trial could not be granted even on motion of the accused. *United States v. Gibert* (1834, C. C. 1st) 2 Sumner, 19. These cases, however, have been overruled in all jurisdictions in the United States either by decision or by statute, and a new trial may now be granted everywhere on motion of the defendant. *United States v. Keen* (1839, C. C. 7th) 1 McLean, 429; *People v. Grill* (1907) 151 Calif. 592, 91 Pac. 515. In England since 1907 "motions for a new trial and the granting thereof" are abolished. See Criminal Appeal Act, 1907, sec. 20. The only possibility now is that the court might grant a new trial *ex proprio motu.* The English courts have refused to do this, even where the defendant has appealed. *Rex v. Dyson* (1908) 1 Cr. App. 13; *Rex v. Dibble* (1908) 1 Cr. App. 155. They still recognize the

common-law exception where the first trial is a nullity. *Rex v. Baker* (1912) 7 Cr. App. 217; *Rex v. Golathan* (1915) 11 Cr. App. 79. In the few cases which have arisen in this country, the decisions are in conflict as to the power of the court to grant a new trial *ex proprio motu,* although all courts will set aside the judgment where the defendant has done no affirmative act. A few courts argue that the defendant has everything to gain and nothing to lose by a new trial. *Commonwealth v. Gabor* (1904) 209 Pa. 201, 58 Atl. 278. A very striking refutation of this theory is found in a case where the new trial resulted in an increase of the sentence from six months to five years. *State v. Snyder* (1889) 98 Mo. 555, 12 S. W. 369. Other courts hold it beyond their power to grant a new trial *ex proprio motu. State v. Williams* (1886) 38 La. Ann. 960; *People v. McGrath* (1911) 202 N. Y. 445, 96 N. E. 92. In the latter case the new trial was granted after the defendant asked to withdraw his motion. American courts, however, unanimously hold that a new trial may be granted by the court of its own motion on the theory that the accused has waived his defense of double jeopardy, where the defendant has appealed from the conviction and the judgment has been reversed. *Stroud v. United States* (1919) 251 U. S. 15, 380 (motion for rehearing), 40 Sup. Ct. 50; *Harvey v. State* (1901, Tex. Cr. App.) 64 S. W. 1039. The adoption of this rule by the English courts would seem an effective means of remedying a mode of procedure which the English judges recognize as inadequate.

EQUITY—JURISDICTION WHERE RES IS IN FOREIGN STATE.—The defendant, a resident of California, bought from the plaintiff, a resident of New York, a half interest in a thoroughbred stallion. The defendant was to have possession and use of the stallion in California during the seasons of 1919 and 1920, and the plaintiff was to have him for use in Kentucky during the seasons of 1921 and 1922. Upon the opening of the season of 1921 the defendant refused to abide by the agreement. The plaintiff brought this suit in New York, personal service of the summons having been made upon the defendant in that state. *Held,* that a mandatory injunction should be granted requiring the defendant to ship the stallion to Kentucky; and that a receiver should be appointed with power to proceed to California, and take appropriate steps, including the invoking of the aid of the courts, to gain possession of the animal and ship him to the plaintiff's stock farm. *Madden v. Rosseter* (1921, N. Y. Sup. Ct.) 114 Misc. 416, 187 N. Y. Supp. 462.

The orthodox doctrine, that equity can enforce its decrees only by personal coercion of the defendant, expressed in the formula *aequitas agit in personam,* needed qualification at an early date by reason of the development of the writs of assistance and sequestration. See Cook, *Powers of Courts of Equity* (1915) 15 COL. L. REV. 106; Huston, *Enforcement of Decrees in Equity* (1915) 78-83. By modern legislation power is generally given to courts of equity to grant decrees *in rem;* but such statutes, of course, have no extra-territorial effect. Where a subject-matter, or res, in another jurisdiction is concerned, a court of equity may entertain the suit only in cases where it has personal jurisdiction of the defendant and where effective relief may be given by a decree *in personam.* See 69 L. R. A. 673-697, note. In such cases the decree is made effectual by ordering the defendant to do or to refrain from certain acts toward the res, and the res itself is thus ultimately but *indirectly* affected. 4 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) secs. 1318, 1437. Where the defendant would be required to go into a foreign jurisdiction and there do affirmative acts, relief may be denied. *Port Royal Ry. v. Hammond* (1877) 58 Ga. 523; see Beale, *The Jurisdiction of Courts over Foreigners* (1913) 26 HARV. L. REV. 293. This is on the ground of expediency in such cases, since interference in a foreign sovereignty is undesirable, and since theoretically the decree would become